SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 65.

MARTHA I. HUNT, PLAINTIFF IN ERROR,

vs.

THE SPRINGFIELD FIRE AND MARINE INSURANCE COMPANY.

BRIEF SUBMITTED IN BEHALF OF PLAINTIFF IN ERROR.

This is a writ of error to the Court of Appeals of the District of Columbia to review their judgment affirming the judgment in favor of the defendant in error, rendered in the supreme court of the District of Columbia December 18, 1901.

STATEMENT OF FACTS.

Plaintiff in error brought suit on a policy of insurance issued by the defendant in error, insuring against loss or damage by fire the certain household furniture and personal property contained in her residence, 1636 Sixteenth street northwest, in the city of Washington, District of Columbia.

The declaration, among other things, alleges that the policy was issued by the defendant to the plaintiff February

2, 1901; that thereafter, along about the 16th and the 17th days of February, 1901, a fire occurred at said dwelling, plaintiff in error being damaged thereby to the extent of $5,000; that all the terms of the policy were complied with in every respect; that the defendant, although repeatedly requested, has failed and refused to pay the damages sustained. The plaintiff claimed in her declaration the sum of $5,000 and $12.50 accured interest.

To this declaration the defendant filed seven pleas, the plaintiff joining issue upon the first, third, and seventh, moving the court to strike out the second and fourth, and demurred to the fifth and sixth pleas (Rec., p. 5). Plaintiff's motion to strike out the second and fourth pleas was sustained, but the demurrer to the fifth and sixth pleas was overruled, to the overruling of which the plaintiff noted an exception (Rec., p. 5). The defendant's fifth plea was that—

> "By said policy of insurance it was provided that if the subject-matter of the insurance should be personal property the said policy should be void if the said property should be or become incumbered by a chattel mortgage, and in fact the subject of insurance in the said policy was wholly personal property and that the same was incumbered by certain chattel mortgages, as more specifically set forth in plea numbered 4."

Plea numbered 4 (Rec., pp. 3, 4) described *three certain deeds in trust* given several months prior to procuring the policy of insurance. Defendant's sixth plea set up as a defense the same condition, and then proceeded to describe as a breach thereof a *certain deed in trust* given by plaintiff subsequent to the procuring of the insurance (Rec., p. 4). The plaintiff in error elected to stand on her demurrer; whereupon judgment was entered for the defendant, from which an appeal was taken to the Court of Appeals and there affirmed (Rec., pp. 7, 8, 9).

ASSIGNMENTS OF ERROR.

1st. The trial court erred in overruling plaintiff in error's demurrer to defendant's fifth plea, the said plea on its face showing that the condition of said policy related solely to encumbrances by chattel mortgages, and the instruments claimed as a breach thereof, set forth in said plea, being instruments of another character and known as deeds of trust (Rec., p. 5).

2d. The trial court erred in overruling plaintiff in error's demurrer to defendant's sixth plea, the said plea on its face showing that the condition of said policy related solely to encumbrances by chattel mortgages, and the instrument claimed as a breach thereof, set forth in said plea, being an instrument of another character and known as a deed of trust (Rec., p. 5).

3d. The trial court erred in holding the instruments recited in the defendant's fifth and sixth pleas (Rec., pp. 3, 4) to be chattel mortgages within the meaning of the condition in the policy of insurance.

ARGUMENT.

The three assignments of error all relate to the one point involved in this case; therefore they will be discussed together.

There of course can be no question but that the condition set forth in the defendant's fifth and sixth pleas, if valid, operates as a forfeiture. Conceding, for the purpose of argument, that this condition is valid, how shall it be construed? We respectfully submit the rule of construction applicable to similar conditions in policies of insurance where said con-

dition may operate as a forfeiture, as laid down by this court in Thompson *vs.* Insurance Company, 136 U. S., p. 196, and by almost, if not all, of the courts of this country, is: "If the policy is so drawn as to require interpretation and to be fairly susceptible of two different constructions, the one will be adopted which is most favorable to the insured. This rule, recognized in all the authorities, is a just one because those instruments are drawn by the company" (136 U. S., p. 297).

In nearly every one of the insurance cases relating to forfeitures the court will be found emphasizing this rule.

See also Knickerbocker Life Insurance Company *vs.* Norton, 196 U. S., p. 246.

Kansas City First National Bank *vs.* Fire Insurance Company, 95 U. S., p. 673.

Upon this point the supreme court of Indiana uses the following lauguage:

> "Provisions intended to create a forfeiture wherever found, are strictly construed in order to avert the forfeiture; but such provisions are restricted, with especial care and strictness, in contracts of insurance, the courts, with an almost unanimous voice, deciding that such contracts, because of their peculiar character, shall be strictly and rigidly construed against the insurance company wherever a strict construction is necessary to prevent the forfeiture of the policy."
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> Continental Insurance Company *vs.* Vanlue, 126 Indiana, p. 410.

This court has recently emphasized this doctrine in the case of McMaster *vs.* New York Life Insurance Company, 183 U. S., p. 26, the court saying on page 40 of its opinion:

> "We are dealing purely with the question of forfeiture, and the rule is if policies of insurance contain inconsistent provisions, or are so framed as to be fairly open to construction, that view should be adopted, if possible, that would sustain rather than forfeit the contract."

The rule of construction having been determined, let us see what is the effect of the condition here relied on, applying this rule. The condition here is "be or become encumbered by a chattel mortgage." We do not contend that this clause is ambiguous and requires interpretation for that reason. What we do contend is that it is limited in its scope. It does not apply to all encumbrances and is not as broad as if the condition was "be or become encumbered," as used in some policies. It is restricted to the character of instrument it specifically mentions.

We therefore contend that it was the duty of the court below, sitting as a court of common law, to construe the condition set up in the fifth and sixth pleas strictly and in accordance with what is meant by the term *chattel mortgage in a court of law*, regardless of what courts of equity have held to be deeds in the nature of chattel mortgages; and if there was even a technical difference between a chattel mortgage and the instruments set forth in the defendant's fifth and sixth pleas, the plaintiff in error's demurrer should have been sustained. That there is a clear and distinct difference in law between a chattel mortgage and a deed of trust, although both instruments have the same effect in a court of equity, seems to be well settled.

Although under the authority if the difference was only a technical one, the courts would favor the insured in preference to having a forfeiture defeat the right to recover, while here we find a substantial difference, which must readily be seen, when we construe the rights of the several parties to the instruments in a court of law. In a chattel mortgage we have a conditional sale by the grantor to the grantee, placing the legal title in the grantee—*i. e.*, the mortgagee—who after default has, in a court of law, all the legal rights of an absolute owner, and can maintain replevin, trover, trespass, or any of the other common-law actions in protection of the property in mortgage, while the grantor or mortgagor cannot sell or transfer the chattels either before or after default without

the consent of the mortgagee. Can it be said that the *cestui que trust*, or party secured by a deed of trust conveying chattels to a trustee, whom the courts sometimes improperly term the mortgagee, maintain any action in a court of law? Is his interest recognized by a court of law in any manner? If so, by what action? However, the defendant may contend that a trustee in a deed of trust is the mortgagee, and after default he can maintain any of the actions that a mortgagee could. A sufficient answer to that contention, we assume, would be that a mortgagee after default has not only the legal title, but, in addition, all the equitable interests that the *cestui que trust* has; and if these are not material and substantial differences, there are none known to the law.

Once say that this clause refers to deeds in the nature of a mortgage and encumbrances generally, because it was the clear intention of the insurance company to prevent one insuring property unless he is the sole owner of the entire interest therein free from liens of all kinds and description, then the courts would necessarily be compelled to hold that the personal tax liens, judgments with execution levied, and even pledges come within its terms. Can this be the law when this condition mentions specifically a certain kind of instrument well known and its character well understood? The reason of the condition being placed in the policy was that the company desired to know what encumbrances there were on the property before insuring, and it cannot be taken into consideration in interpretating its scope. These pleas setting up this condition do not allege that plaintiff stated in his application for insurance there were no chattel mortgages on the property which would, of course, in effect be a warranty and probably place defendant in a more favorable light. *Here we have pleas which set up a forfeiture clause without any allegation of misrepresentation whatever in relation to the condition relied upon*, and right in this connection we desire to call the court's attention that if there

were any misrepresentations we can assume that the application will show. We must assume, of course, that there was an application made, as the law in this jurisdiction required, at the time this policy here sued on issued. Section 6 of the act of January 26, 1887, p. 582, vol. 1, Supplement of Revised Statutes U. S., is:

> "That each insurance company doing business in the District of Columbia shall attach to each policy issued by such company a copy of the application made by the insured, so that the whole contract may appear in said application and policy."

In Maryland there is an act of the legislature that required an affidavit to be endorsed upon every deed of mortgage and bill of sale, to make them valid, by the mortgagee or grantee, that the consideration therein set out is true and *bona fide*. The question whether this act applied to deeds of trust arose in the case of Charles *vs.* Clagett, 3d Maryland, p. 82. The facts of that case were that one Grimes owning certain property in Washington county, Maryland, and being a non-resident, Charles, a creditor, sued out an attachment which was levied upon certain property. At the return day Clagett appeared claiming title to the property under a deed of trust from Grimes and wife, which had been duly recorded, given to secure a note owned by a third party in the sum of six thousand ($6,000) dollars. The plaintiff, Charles, was ordered to reply to the claim of Clagett, and did so by alleging that the deed under which Clagett claimed was a deed of mortgage, and no affidavit having been made, either by the trustee or his *cestui que trust*, that the condition therein set forth was true and *bona fide*, as required by the act, the said deed was void. The parties then filed an agreed statement of facts in which the non-residence of Grimes, the debt on which the attachment was issued, the dates of the deed and its recording, and that the property levied on was embraced in it, were admitted, and the case was sub-

mitted to the court for its opinion as to whether it was an instrument which came within the terms of the act. The trial court decided it did not.

The plaintiff, Charles, appealed, and, after an exhaustive discussion of the case by counsel and the court, the court decided the deed of trust does not come within the purview of the act, and in the course of its opinion said:

> "It has been insisted by the appellant's counsel, that inasmuch as the deed in controversy was intended to secure the payment of a debt, and contains what he terms a redemption clause, it is a mortgage, within the meaning of the statute. If this be true, it is difficult to perceive, why it is not also a deed conveying all the grantor's property to a trustee, with power to sell after a time limited, and apply the proceeds to the payment of the debt, if he, the grantor, should fail to pay them by the appointed time, providing for a reconveyance, in case of payment by him within the time. * * *
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> "Once admit that the word *mortgage* in this statute includes any other instrument than a purely technical mortgage, under which there is not only an equity of redemption in the mortgagor, but on failure of payment, the mortgagee may recover possession of the premises, take and retain the rents and profits, and has the right of foreclosure, and it will be exceedingly difficult to say what deeds are or what are not within the act. It will be no easy task to define the dividing line between mortgages and deeds of trust.
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> "There are instruments which are mortgages only by equitable construction * * * A vendor's lien is called an equitable mortgage.
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> "In my opinion the act of 1846 should be construed as including mortgages, technically such.
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> "Much fault is found with the indiscriminate and improper extent to which, in some instances, these subjects" (mortgages and deeds of trust) "have been

blended, and particularly in applying the term trustee to a mortgagee. The names of mortgagor and mortgagee are considered the most proper to characterize the relation. These are 'characters as well known, and their rights, powers and interests as well settled, as any in the law.' This is introduced as the remark of Mr. Justice Buller in Birch *vs.* Wright. *Of course he had reference to a mortgage, technically such, and not one which is so considered merely by equitable construction.*

"When we resort to the elementary writers for the definition of a mortgage, it will be seen that on failure in payment, the legal title and the right of possession are in the mortgagee, with the privilege of foreclosing at his pleasure.

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"In the present deed the legal estate is conveyed to the trustee; the *cestui que trusts*, who have been called the mortgagees, in no event are entitled to possession, nor have they any right of foreclosure."

See also—

Bank of Commerce *vs.* Lannahan, 45th Maryland, pp. 396–407.

Stanhope *vs.* Dodge, 52 Md., p. 490.

Harrison *et al. vs.* Annapolis & Elkridge R. R. Co., 50th Md., p. 490.

The *nisi prius* courts in Maryland, in construing the recent act of the legislature of that State imposing a tax on all mortgages, have all held that it does not apply to deeds of trust and they are not affected by it.

The court of appeals in disposing of the case at bar says "that the argument in support of this contention is ingenious, but lacks substantial foundation. There is no ambiguity in the language of the condition set out in the policy, and its plain purpose is to guard against encumbrances of the insured personal property without the knowledge of the insured, whether it be by way of a technical chattel mortgage simply by such a mortgage with power of sale in the mortgagee, or by a conveyance in trust to third

persons with similar power of sale in case of default of the mortgagor, each as a chattel mortgage within the ordinary meaning of the term" (Rec., p. 8).

With all due respect to that court, this is certainly begging the question.

The court then recited the case of Middleton *vs.* Park, 3 Appeals D. C., 149–164, in support of its decision. Upon examination of this case we find that it has absolutely no application to the case at bar. The following were the facts: A guardian, upon a proper showing to the orphans' court, was authorized to borrow $300 by a mortgage upon certain of the infant's real estate for the purpose of paying taxes in arrears and a few debts. Upon her petition in the supreme court of the District of Columbia, holding an equity court, the orphans' court order was ratified by said court. The guardian then proceeded to borrow $300, payable in three years, and executed a deed of trust of the property in question to two trustees, the deed of trust being similar to the ordinary form used in the District of Columbia. A default being made, the trustees, under the terms of the deed of trust, offered the property for sale, and the defendant Park became the purchaser. Fourteen years thereafter the infant brought an action of ejectment to recover the property. The court, in its opinion, says, on page 163:

> "But it is contended * * * that even if it be that the court had power to direct the execution of a mortgage, yet the authority given to the guardian was not properly exercised in this instance by an execution of a deed of trust, such as is here given.
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> "It is argued that a deed of trust differs from a mortgage; * * * and that it was improper in any event to convey the property to two strangers as it was done here to make sale of it in a certain contingency. These and other minor objections that have been suggested rather tend to impeach the irregularities of the transaction, which can scarcely be done in a collateral proceeding. * * * There remains, however, the question whether the execution

of a deed of trust is a compliance with the authority 'to mortgage the real estate of said minor.' It is sufficient answer to this that the deed of trust is the only form of mortgage which has been in general use in the District of Columbia for many years. The common-law mortgage is practically unknown with us; and every one understands that, when a mortgage of real estate here is spoken of a deed of trust is what is intended. *The petition of Katherine Middleton alleges that it was better to mortgage the property than to sell it and asked for leave to borrow the money upon a deed of trust or mortgage, and the order of the court was for leave to mortgage it.*

"The deed of trust is here used as an equivalent of a mortgage, and so the term is universally used by the community. Indeed, while a mortgage is not necessarily, perhaps, a deed of trust, a deed of trust to secure a loan of money is necessarily a mortgage" (Rec., pp. 163, 164.)

As we have shown, that case related solely to the proper construction of an authority granted by a court of equity, and of course was treating the question from the point of view of the court who granted the authority. We, of course, concede, as Mr. Justice Morris states in that decision, that "in equity a deed of trust has the same force and effect as a mortgage." But could the Court of Appeals of the District of Columbia have intended to say that there is no distinction in a court of common law between a mortgage and a deed of trust? Certainly they could not have been ignorant of the Maryland authorities, when in fact their chief justice delivered the opinion in the case of The Bank of Commerce *vs.* Lannahan, 45 Md., p. 396.

The Court of Appeals, in the case at bar, says: "There is no ambiguity in the language of the condition set out in the policy" (Rec., p. 8). There is no contention on our part that there is an ambiguity. What we contend is not that the language is ambiguous, but that the condition should not be construed liberally; that it should not be held to in-

clude instruments in the nature of a mortgage. The court further says: "Its plain purpose is to guard against the encumbrances of the insured personal property without the knowledge and consent of the insured. * * *" If such be its intended purpose, why did not the insurance company make the condition specifically refer to deeds in the nature of mortgages or use language sufficiently broad to include all encumbrances? The only purpose of this condition is to create a cause for forfeiture; it is not to protect the company issuing the policy, as the risk is in no measure enhanced by reason of encumbrances of this character or of any character. The companies do not refuse to insure where encumbrances exist, whether by chattel mortgage or by chattel deeds of trust; nor do they exact a higher rate of premium for accepting such rates. It has been suggested in some of the early cases that where an encumbrance exists the party insured has not the same interest in the property as he would otherwise have; that the party secured has an interest. This idea has long sinee been exploded, as the courts have repeatedly said if there is an encumbrance there is an obligation for the insured to pay, and if the property is destroyed and there is no insurance the debt still exists.

The supreme court of Indiana, in the case of Continental Insurance Company *vs.* Vanlue, in discussing this proposition, said:

> "The ground upon which rests the distinction between contracts of insurance and other contracts is a solid one, for the contract of insurance is, in many respects, a peculiar one. There is a strong reason for limiting the effect of the word 'encumbrance' when employed in policies of insurance, since to give the word a broad meaning would do injustice in many instances without excuse or justification. The purpose for which provisions prohibiting encumbrances are written in policies, is to create a cause for forfeiture, not to protect the company issuing the policy from a defect in the title of property conveyed to it; nor to vest in it an unencumbered title, and the only

> just reason for recognizing such prohibitions is that if the property is encumbered there may be some temptation to the owner to himself burn the property and thus secure the amount of the insurance" (126 Ind., pp. 414, 415).

Thus again the court in the same case says:

> "We are required by the rules to which we have referred to give the policy before us a very strict construction against the appellant, and to avert a forfeiture, if we can do so without doing violence to the language of the contract."

The statement by the Court of Appeals in the case of Middleton *vs.* Park that "it is sufficient answer to this that the deed of trust is the only form of mortgage that has been in general use in the District of Columbia for many years" is no doubt true, in so far as real estate is concerned, in which connection the court was discussing the matter in that case, *but it is not true as regards the use of the chattel mortgage and the chattel deed of trust.* The common-law chattel mortgage is used as frequently, if not to a greater extent, than chattel deeds of trust in this District and always has been in general use. There is hardly a secular day that instruments of both characters are not recorded and filed of record in the office of the recorder of deeds of the District of Columbia, and in this connection we desire to call the court's attention to the Real Estate and Court Record, which is a small newspaper published in the District of Columbia for the benefit of the legal profession, and in copies of this paper published on the following dates there will be found notices of the recording of instruments of both characters: July 22, 23, 25, 28, and 29, August 1, 2, 4, 9, 11, 15, 18, 20, 24, 31, September 1, 2, 7, 8, 9, 15, 20, 21, 22, 23, 24, 26, and 30, October 5, 6, 10, 14, 15, 18, 19, 20, 21, 25, 26, 27, 28, 29, 31, and November 1, in the year 1904. This memorandum of dates is taken at random

from recent files on hand, but is a fair statement of what the average for years past would show.

After a full and careful consideration of all the authorities we contend, on behalf of the plaintiff in error, that it is apparent that the courts below erred, and we respectfully submit the judgment of the Court of Appeals affirming the judgment of the supreme court of the District of Columbia overruling plaintiff's demurrer to the defendant's fifth and sixth pleas should be reversed.

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